

**ALVINA M. OSTRANDER**

Claimant contends she proved her accidental injury was discussed at the meeting the next day, based on her testimony and the corroborating testimony of Carroll Flangan, thus disputing the testimony of claimant's supervisor, Ms. Olson. Claimant also maintains her testimony and that of Ms. Flangan is more credible than that of Ms. Olson. According to claimant, the notice received by respondent the day after the accident provided it with the opportunity to investigate the claim, but Ms. Olson failed to do her job and complete an incident report. Alternatively, claimant contends respondent had actual knowledge of the injury. Claimant requests the preliminary hearing Order be reversed.

Respondent contends Ms. Flangan's testimony is suspect because she admitted on cross-examination that claimant did not say during the meeting she hurt her back lifting the wheelchair. Respondent argues claimant admitted she not give timely notice and Ms. Flangan's testimony does not change that admission. Respondent requests the ALJ's decision be affirmed.

The issues are:

1. Was respondent given timely notice of claimant's injury by accident?
2. Did respondent have actual knowledge of the injury?

#### **FINDINGS OF FACT**

The factual summary in the undersigned Board Member's March 19, 2015, Order is incorporated herein by reference as though fully set forth. Supplemental findings are set forth below. All evidence in the record was considered in arriving at this decision.

Claimant again sought benefits at a preliminary hearing on November 17, 2015, with new evidence regarding notice and actual knowledge.

Carroll Flangan testified by deposition on October 13, 2015. Ms. Flangan testified that at the time of claimant's accident, she was respondent's social service director. She and claimant shared an office and the accident happened in their office doorway. Ms. Flangan testified she witnessed the wheelchair becoming stuck in the door frame because the resident was oversized and barely fit through the doorway.

Ms. Flangan recalls a department head meeting not long after claimant's accident, but does not recall the date of the meeting. Her recollection apparently improved because she later asserted the meeting was within 48 hours following the accident. Ms. Flangan testified it was a standard meeting where the attendees discussed new orders, potential new admissions, discharges, additional incident reports to be filed, or anything new going on at the facility. Typically, the meetings lasted one-half hour to an hour.

Ms. Flangan testified all department heads attended the meeting, including the dietary manager, business office manager, director of nursing, activities director, maintenance, transportation and social service director. Ms. Flangan testified Ms. Olson was also present at the meeting. According to Ms. Flangan, claimant said at the meeting a resident got stuck in the doorway and claimant lifted the resident's wheelchair to move it. Ms. Flangan testified claimant said she thought she might have hurt her back, but Ms.

Flangan did not remember her exact wording. Ms. Flangan asserted claimant said she injured her back.<sup>1</sup>

Ms. Flangan stated she noticed Ms. Olson was not happy and stated she would fill out an incident report, then left the meeting. The meeting lasted another 15 to 20 minutes.

Ms. Flangan admitted she and claimant were friends and they socialized when they worked for respondent. Ms. Flangan has seen claimant once since she quit working for respondent, and talked to claimant on the phone a couple of times.

On cross-examination, Ms. Flangan altered her testimony regarding what claimant said at the meeting:

Q. Okay. So there was no specific, I hurt my back at work; you assumed that it happened at work?

A. Her – she did explain that the back pain did not start until after she moved the wheelchair.

Q. When did she explain that?

A. Huh? It would have been in that department head meeting.

Q. But she was saying at that time she didn't know her back was hurt from lifting the wheelchair, so how could she tell somebody it was work related if she didn't know at that point?

...

A. I don't know, maybe it was just me putting two and two together.

Q. So making some assumptions then?

A. Yeah.

Q. But you never heard Ms. Ostrander tell Ms. Olson, I hurt my back lifting this wheelchair?

A. Maybe later on.

Q. Later on as in weeks later, days later?

A. After she would have seen the doctor.

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<sup>1</sup> Flangan Depo. at 21-22.

Q. Okay. But not during this meeting?

A. Probably not.<sup>2</sup>

#### **PRINCIPLES OF LAW AND ANALYSIS**

The applicable law is set forth on pages six through eight of the March 19, 2015, Order and need not be repeated.

This Board Member finds respondent was not given timely notice of claimant's November 6, 2013, injury by accident and that respondent did not have actual knowledge of the injury.

There is no dispute claimant sustained personal injury by accident arising out of and in the course of her employment when she attempted to dislodge a wheelchair, with a large resident aboard, that was stuck in the door frame of claimant's office. There is also no dispute that a department head meeting occurred, probably on the day following claimant's accident, and that claimant, Ms. Olson and perhaps Ms. Flangan were in attendance. Claimant testified the wheelchair incident and the problem of the resident's weight were discussed at the meeting. However, claimant admitted she did not, at that time, know her back was hurting because of attempting to lift the wheelchair, and that she had no intention of reporting a work related injury at the meeting. Ms. Olson's testimony was she did not receive notice that claimant was claiming she was injured due to the wheelchair accident until January 13, 2014.

Ms. Flangan testified claimant said at the meeting a resident got stuck in the office doorway when claimant lifted the resident's wheelchair to move it. Ms. Flangan testified claimant said she thought she might have hurt her back, but Ms. Flangan did not remember her exact wording. Ms. Flangan also asserted claimant said she injured her back. But Ms. Flangan's testimony is not only inconsistent with Ms. Olson's testimony, but also with claimant's testimony that at the time of the meeting, she did not know why her back was hurting and that she had no intention of reporting a work related injury.

Ms. Flangan's testimony also conflicts with itself. On cross-examination, she admitted she was assuming claimant said at the meeting she hurt her back lifting the wheelchair. Ms. Flangan also admitted claimant probably did not say she hurt her back in the wheelchair incident. She seemed unsure when the department head meeting occurred. Ms. Flangan's testimony conflicts with claimant's testimony that she was in front of the wheelchair, facing the resident, when claimant attempted to dislodge the wheelchair. Ms. Flangan testified claimant "came up behind [the resident] when she was stuck and tried to pull her out."<sup>3</sup>

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<sup>2</sup> *Id.* at 23-24.

<sup>3</sup> *Id.* at 9.

The additional testimony offered by claimant lacks credibility. The undersigned Board Member finds claimant has neither proven respondent was given timely notice of claimant's injury by accident or respondent had actual knowledge of the injury.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>4</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

**CONCLUSIONS**

1. Respondent was not given timely notice of claimant's injury by accident.
2. Respondent did not have actual knowledge of claimant's injury.

**DECISION**

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Ali Marchant dated November 25, 2015, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of February, 2016.

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HONORABLE GARY R. TERRILL  
BOARD MEMBER

c: Chris A. Clements, Attorney for Claimant  
cac@cl.kscoxmail.com  
angie@cl.kscoxmail.com

Stephen P. Doherty, Attorney for Respondent and its Insurance Carrier  
sdoherty@hdwlawfirm.com

Honorable Ali Marchant, Administrative Law Judge

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<sup>4</sup> K.S.A. 44-534a.